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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of DARLENE E. and THOMAS A. MARDESICH.	
NANCY MARDESICH et al., Respondents, v. THOMAS A. MARDESICH, Appellant.	G023753 (Super. Ct. No. D106315) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Myron S. Brown, Judge. Affirmed.

Stuart W. Knight for Appellant.

Law Offices of Brian G. Saylin and Brian G. Saylin for Respondents.

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I

The 1976 judgment of dissolution between Darlene and Thomas Mardesich handled the community interest in Thomas' pension with the Longshoremen's union in this language: "[Wife] shall receive one-half of the [husband's] Retirement Fund to which he is presently entitled, payable when [husband] receives any payment from that fund, which fund is the International Longshoremen's & Warehousemen's Union - Pacific Maritime Association Benefit Funds."

Thomas was born in 1935, and in 1997 could have retired at age 62 at a full pension of $2,450 per month, having been with the Longshoremen since 1959 -- that is, almost 38 years. However, at that late age he found himself supporting three young grandchildren (ages 9, 11, and 13) and chose not to retire. Unfortunately, Darlene had developed breast cancer, so she wanted her share of the money as soon as possible. Darlene brought a motion to enter a "QDRO" (qualified domestic relations order) that provided she would immediately receive 23.45 percent of each monthly payment otherwise payable to Thomas. The figure was calculated on the "time rule," i.e., Darlene was going to get half of the community percentage of time that it took to earn the pension. Thomas argued that Darlene was only entitled to half of the monthly income he would receive using the 1976 value of the plan, which would be $375. The difference in theories meant Darlene would receive either about $575 or $188. The trial court granted Darlene's motion, entered the QDRO, and from that order Thomas has brought this appeal.

Darlene died on the day originally set for oral argument, and it was only on October 28, 2002, that Thomas obtained from the trial court an order substituting in Darlene's two adult children, Nancy and Ronald Mardesich. (See Cal. Rule of Court, rule 48(a) ["Whenever a substitution of parties to a pending appeal is necessary, it shall be made by proper proceedings instituted for that purpose in the superior court. On suggestion thereof and the presentation of a certified copy of the order of substitution

made by the superior court, a like order of substitution shall be made in the reviewing court."].)[1] The substitution fits the substance of the case, because Darlene's two children are apparently now receiving payments from Thomas' pension fund, and if Thomas were to prevail (i.e., 1976 value instead of the time rule were the appropriate mode of calculation), presumably those payments would all be diverted to Thomas until the total of the various payments reflected each side's proper interest in his pension.[2]

II

The problem with the time rule is that it doesn't compensate for the disproportionate effects on pension benefits of the last years of work before retirement. Where the dissolution takes place at the end of the worker's tenure, the disproportionate effect will tend to unfairly *minimize* the community's contribution. The later, community years are worth more. By contrast, if the dissolution takes place with many years of work yet to go, the time rule tends to unfairly maximize the community's contribution, because the separate years are worth more. The problem with *not* using the time rule, however, is that without it, interest and accumulations on a share in a pension plan are not properly accounted for.

Because a precise calculation of the respective community and separate contributions to a pension benefit is a mathematical nightmare (at least for most lawyers and judges who would not be familiar with the kinds of sophisticated equations necessary to account for the fact that in most pensions each year has a successively increased value in relation to the previous), the common law solution has been to afford trial courts "very

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[1] Just so there is no doubt, we now hereby order the order the substitution of Nancy and Ronald Mardesich for Darlene Mardesich in this court. That should take care of the precedural obstacle that has hamstrung the prosecution of this appeal up to now.

[2] The questions of (a) whether children, such as Nancy and Ronald, are substantively entitled under the terms of the plan to receive a deceased parent's share; (b) whether, if they are so entitled, what is the time period for which they should receive that share, or even (c) what is the nature of any mechanism by which they might receive such a share, are not before us. They have not been briefed and we express no opinion on them. That is a separate issue, not dealt with here. Today's opinion merely adjudicates the question of whether the QDRO properly calculated Thomas' and Darlene's respective shares.

broad discretion" in selecting the method of apportionment. (*In re Marriage of Gowan* (1997) 54 Cal.App.4th 80, 88.) The main limitation on the power is found in the case on which Thomas places his hopes, *In re Marriage of Poppe* (1979) 97 Cal.App.3d 1, 9, which held that the time rule could not be equitably applied where the benefit is not substantially related to the years of service.

The problem for Thomas is that *Poppe* involved a Naval Reserve pension where the benefit was calculated based on a complicated system of "points" to account for the fact that Naval Reserve personnel do *not* serve continuously. For example, the employee-spouse got 14 to 15 points for each year's annual two weeks training duty, but would receive a point per day of active duty. Qualifying years had to have 50 or more points, but once the minimum qualifying years were met, points were calculated regardless of years. (See *Poppe, supra*, 97 Cal.App.3d at p. 5.) Hence the appellate court could easily say that "the amount of the pension is not a function of the number of years of service." (*Id*. at p. 9.)

In the present case, however, there is no evidence that the pension benefit is anything other than a "function" of the number of years of service, and so use of the time rule would clearly be within the discretion of the trial court. In fact, the letter from Susie Patrick, the Pension Payrolls Manager for the union's pension fund, speaks only of "years of service" when it references what Thomas is owed.

Next comes Thomas' argument that the QDRO was somehow beyond the jurisdiction of the court because the judgment of dissolution specifically provided that Darlene was only going to get her one half of Thomas' pension to which she was "presently entitled" in 1976, and there was no reservation of jurisdiction for modification. The theory is that the trial court was impermissibly modifying the judgment to enter a QDRO based on a time rule calculation. The answer to this point is that the text of the 1976 judgment, when properly parsed out, does not restrict Darlene to just one-half of the value of the pension in 1976. The critical clause, "to which he is presently entitled," as

used in the phrase, "one-half of the [husband's] Retirement Fund to which he is presently entitled, payable when [husband] receives any payment from that fund," sets forth words of identification. They are necessary to establish that only that part of the plan is community which was earned up to the date of the 1976 dissolution. Otherwise, the sentence would read, "one-half of the husband's retirement fund, payable when he received any payment from that fund," which would clearly give Darlene too much (one-half of all contributions, including post-separation contributions).

Finally, Thomas asserts that no QDRO could be made that contemplated distribution *before* he actually retired and started receiving benefits. Not so. *In re Marriage of Gillmore* (1981) 29 Cal.3d 418 is directly on point. (See *id*. at p. 428 ["if the nonemployee spouse chooses to receive immediate payments, as Vera does, he or she has a right to do so"].)

The order appealed from is affirmed. (We stress that we only determine that the QDRO appealed from was correct when entered. As we have said in the margin, we express no opinion as to the nature of Nancy and Ronald Mardesich's substantive rights under the plan.) In the interests of justice each side should bear its own costs on appeal.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

O'LEARY, J.